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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1297

AARON LAX, M.D.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

JOSEPH SHEMARIA
JOSEPH F. WALSH
Attorneys at Law
9000 Sunset Boulevard
Suite 1100
Los Angeles, CA 90069
(213) 278-2660

Attorneys for Petitioner

JW

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On Writ of Certiorari to the
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PETITION FOR WRIT OF CERTIORARI

The Petitioner, AARON LAX, M.D., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on February 15, 1978.

OPINIONS BELOW

The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit is unreported and is attached as an appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on February 15, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1) and (2).

QUESTIONS PRESENTED

1. Whether a request for "all evidence of any promises made or consideration paid to any undercover agents or persons acting for the government in exchange for testimony in this case" constitutes a "specific request" under United States v. Agurs, 427 U.S. 97 (1976) or, as the Court of Appeals held, constitutes merely a "general request" under Brady v. Maryland, 373 U.S. 83 (1963).

2. Whether the third test of United States v. Agurs, 427 U.S. 97 (1976), requiring that the undisclosed evidence create a reasonable doubt as to the defendant's guilt, is an appropriate standard of review in situations where the undisclosed evidence solely affects the credibility of a key government witness.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall...be deprived of life, liberty, or property, without due process of law...

STATEMENT OF THE CASE

On August 2, 1976, an Indictment was filed in the United States District Court for the Central District of California charging the Defendant and Appellant, Aaron Lax, M.D., with eight counts of violation of 21 U.S.C. §841(a)(1). Count I alleged that on March 25, 1976 the Appellant did attempt to distribute amphetamines. Count II alleged that on March 29, 1976, the Appellant did possess with intent to distribute cocaine. Count III alleged that on March 29, 1976 the Appellant did distribute cocaine. Count IV alleged that on April 6, 1976 the Appellant did attempt to distribute methaquatone. Count V alleged that on April 7, 1976 the Appellant did possess with intent to distribute cocaine. Count VI alleged that on April 7, 1976 the Appellant did distribute cocaine. Count VII alleged that on April 27, 1976, the Appellant did attempt to distribute methaquatone. Count VIII alleged that on April 27, 1976, the Appellant did attempt to

distribute amphetamines. All eight counts alleged that the Appellant acted "not in the usual course of professional practice for a legitimate medical and research purpose." (C.T. 1-8)

On August 9, 1976, the Appellant pleaded not guilty. (C.T. 10) Trial was by jury. (C.T. 142-144; 178-179) On December 16, 1976 the jury returned a verdict of not guilty on Counts I, IV, VII, and VIII, and a verdict of guilty on Counts II, III, V and VI. (C.T. 180) On March 14, 1977, Appellant's motions for a new trial and for judgment of acquittal were denied. (C.T. 265) Imposition of sentence as to imprisonment was suspended and Appellant was placed on probation for five years. It was further ordered that Appellant pay a fine of $25,000.00 for each of the four violations and said fines were imposed consecutively. Total fine was $100,000.00. (C.T. 266) On March 14, 1977, Appellant filed a Notice of Appeal. (C.T. 267) On February 15, 1978, the United States Court of Appeals for the Ninth Circuit affirmed the conviction, but remanded the case for resentencing.

STATEMENT OF THE FACTS

Aaron Lax, M.D., the Petitioner, is a licensed California physician, practicing medicine in Beverly Hills, California. Leonard Grossman, the government's star witness and informer, had been a patient of Dr. Lax's since 1968. (3 R.T. 425, L.2-7)

On April 7, 1975, Leonard Grossman was arrested for selling cocaine by agents of the Drug Enforcement Administration. (2 R.T. 139) Approximately one year after his arrest, he agreed to help set up Petitioner for a narcotics violation in exchange for the government's promises of leniency.

As a result of Grossman's diligent efforts, Petitioner finally dispensed an ounce of cocaine to Grossman on two occasions. Both transactions were recorded and played for the jury.

In the course of cross-examination, Grossman admitted that Petitioner had examined or treated him on well over one hundred occasions. Grossman admitted having received many prescriptions for various medications throughout his long relationship with Petitioner.

Grossman refused to identify who supplied

him with the large quantity of cocaine he helped sell to a Drug Enforcement Administration agent, but eagerly testified against Petitioner.

Petitioner relied upon the defenses of entrapment and the "course of professional practice." Although he was acquitted of the four counts charging illegal attempts to distribute controlled substances (the "prescription" counts), he was convicted of the four counts arising out of the two cocaine transactions.

Significantly, there was no evidence from any other person other than Grossman. This was essentially a one witness case. Nevertheless, when it came to assessing credibility of convicted cocaine dealer Grossman and Petitioner, who testified that he was treating Grossman for cocaine addiction and withdrawal and was clearly ensnared into dispensing the cocaine (by Grossman's pleadings), the jury believed Grossman's denials of both his cocaine addiction and his pleading with Petitioner.

Grossman pled guilty to conspiracy to trafficking in cocaine in camera and the plea proceedings were sealed by order of the district court.

At Petitioner's trial, Grossman adamantly

proclaimed that the only deal he had with the Government was that they would "recommend probation and move to dismiss the remaining counts." Grossman expressly denied that the Government had agreed to allow him to withdraw his guilty plea if the court gave him any period of incarceration. This testimony was discovered to be false after Petitioner was convicted.

The transcript of Grossman's guilty plea proceeding clearly establish that both sides agreed to allow him to withdraw his plea if he was to be incarcerated "in any manner."

That defense counsel never was apprised of the true terms of Grossman's deal with the Government has never been in issue. Petitioner's prosecutor himself claimed he had no knowledge of the deal and the former Assistant United States Attorney who made the deal never told him of it.

REASONS FOR GRANTING THIS WRIT

I

DOES A REQUEST FOR "ALL EVIDENCE OF ANY PROMISES MADE OR CONSIDERATION PAID TO ANY UNDERCOVER AGENTS OR PERSONS ACTING FOR THE GOVERNMENT IN EXCHANGE FOR TESTIMONY IN THIS CASE" CONSTITUTE A "SPECIFIC REQUEST" UNDER UNITED STATES V. AGURS, 427 U.S. 97 (1976) OR, AS THE COURT OF APPEALS HELD, CONSTITUTE MERELY A "GENERAL REQUEST" UNDER BRADY v. MARYLAND, 373 U.S. 83 (1963)

The Circuits are in conflict and there is an overwhelming need for this Court to determine what constitutes a "specific" versus a "general" request for discovery materials under United States v. Agurs, 427 U.S. 97 (1976). In United States v. Agurs, supra, this Court made a sharp and significant distinction between a "specific request" for evidence in the government's possession and a "general request" for exculpatory evidence. The latter was held to be equivalent to no request at all. Agurs states that "when the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable." United States v. Agurs, supra, at 106. When there is a "general request" (or no request at all),

the conviction must be reversed "if the omitted evidence creates a reasonable doubt that did not otherwise exist." United States v. Agurs, supra, at 112.

Quite obviously, lower courts must first decide whether a request for discovery materials is "specific" or "general" prior to determining which standard of review governs the case. There appeals to be unanimity of confusion in the circuits on the issue of what constitutes a "specific request."[1/]

The present case is a perfect example of the confusion surrounding what constitutes a "specific request." In the instant case Petitioner moved for, and received, a supplemental[2/] discovery order that included the following:

> 10. All evidence of any promises made and/or valuable consideration paid

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1/Compare, United States v. Lasky, 548 F. 2d 835, 839 (9th Cir. 1977) with United States v. McCrane, 547 F. 2d 204,207-208 (3rd Cir.1976).

2/Prior to moving for a Supplemental Discovery Order, the district court had already issued its own standard order for discovery which requires the Government to supply defense counsel with "all Brady v. Maryland" materials. (C.T. p. 13, L.29-30).

> to any undercover agents or any persons acting for the government or acting in its behalf in connection in exchange for his testimony and/or involvement with this case. (C.T. p.94, L.8-11)

The Court of Appeals held that this constituted only a "general request" for discovery and applied the wrong standard of review:

> And even assuming that the complete plea bargain was not disclosed, the standard of review is whether the undisclosed evidence creates a reasonable doubt about Lax's guilt that did not otherwise exist since Lax made only a general request for exculpatory material. See, United States v. Agurs, supra; United States v. Brown, supra; Skinner v. Cardwell, __F.2d__ (9th Cir. 1977). [Opinion, p.3-4]

Petitioner respectfully and vigorously disagrees with the Court of Appeals' conclusion that his pre-trial request was a "general request." Indeed, it is difficult to imagine how Petitioner's counsel could have been more specific in his request given the fact that the case was in the pre-discovery stage when the request was made.

In United States v. McCrane, 547 F. 2d 204 (3rd Cir. 1976) the government failed to

disclose to the defendant in a criminal case the fact that the government's key witness was not being prosecuted as a result of his cooperation and testimony given in the defendant's case. Prior to trial, defendant's counsel moved for discovery of "[M]aterial which may be used to impeach prosecution witnesses, including but not limited to any standards used by the Department of Justice, the Treasury Department, the Internal Revenue Service, or the United States Attorney in declining prosecution of similar cases." (547 F. 2d at 207). This was held to be a specific request under the Agurs case. The Court applied the second test of Agurs and reversed the conviction. Interestingly, the Court notes that the government conceded that a request is specific if it requests disclosure of "all promises made to the witness and all actions undertaken on the witness' behalf or at the witness' request." (547 F. 2d at 208)

In direct contrast with the Third Circuit is the Ninth Circuit case of United States v. Lasky, 548 F. 2d 835 (9th Cir. 1977). In Lasky, a key government witness in a conspiracy to import cocaine trial testified that he had

made only two narcotics smuggling trips. After the trial the prosecutor disclosed information that the witness had in fact made four narcotics smuggling trips, two with cocaine and two with marijuana. On appeal the defendant argued a due process violation based upon suppressed evidence. The Court noted that prior to trial the defendant requested discovery as follows:

> [D]elivery to the defendant of all evidence favorable to him under the authority of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215, including all information regarding police records, arrests, convictions, and any deals, promises or communications with Government witnesses regarding benefits they may receive, or have already received, for testifying against defendant, pursuant to Giglio v. U.S.,405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104. [United States v. Lasky, supra, at 839 n.2]

The defendant additionally requested "all probation reports, presentence interviews, and reports for 14 individuals including David Stutler," who was the key government witness. The above requests were held to be only "general requests" and the Court affirmed the conviction after applying the third test of Agurs, whether the omitted

evidence creates a reasonable doubt that did not otherwise exist. United States v. Lasky, supra, at 839.

II

WHETHER THE "THIRD TEST" OF UNITED STATES V. AGURS, 427 U.S. 97 (1976), REQUIRING THE UNDISCLOSED EVIDENCE TO, IN ITSELF, CREATE A REASONABLE DOUBT AS TO THE DEFENDANT'S GUILT, WAS INTENDED BY THIS COURT TO APPLY TO GIGLIO-TYPE OF EVIDENCE THAT CAN ONLY AFFECT THE CREDIBILITY OF GOVERNMENT WITNESSES AND WHICH, IN ITSELF, CAN NEVER RISE TO THE LEVEL OF CREATING A REASONABLE DOUBT ABOUT A DEFENDANT'S GUILT.

Mr. Chief Justice Burger, writing for a unanimous Court, in Giglio v. United States, 405 U.S. 150 (1972) held:

> Here the Government's case depended almost entirely on Taliento's testimony; without it there could have been no indictment and no evidence to carry the case to the jury. Taliento's credibility as a witness was therefore an important issue in the case, and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility

and the jury was entitled to know of it. [405 U.S., at 154-155]

Four circuits[3/] have now concluded that Giglio, supra, has been decapitated by United States v. Agurs, 427 U.S. 97 (1976). The rationale of the four Circuits (including the opinion in Petitioner's case) is simplistic: regardless of how damaging certain evidence in the possession of the Government might be to the credibility of its own witnesses at a defendant's trial, non-disclosure of such evidence does not require reversal unless the undisclosed evidence, itself, creates a "reasonable doubt that did not already exist." (Memorandum Opinion, p.4)

3/Ninth Circuit: Skinner v. Cardwell, 564 F. 2d 1381 (9th Cir. 1977); United States v. Brown, 562 F. 2d 1144 (9th Cir, 1977); Second Circuit: United States v. Stassi, 544 F. 2d 579 (2d Cir. 1976); Eighth Circuit: United States v. Smith, 538 F. 2d 1332 (8th Cir. 1976); Fifth Circuit: United States v. Masri, 547 F. 2d 932 (5th Cir. 1977); United States v. Washington, 550 F. 2d 320 (5th Cir. 1977).

That this Court did not intend Agurs, supra, to overrule Giglio, supra, is self-evident from the Agurs opinion. To apply this illogical test would certainly require a total disregard for Giglio, supra. If the Ninth Circuit's opinions in the instant case, Skinner v. Caldwell, 564 F. 2d 1381 (9th Cir. 1977), and United States v. Brown, 562 F. 2d 1144 (9th Cir. 1977) represent valid law, Mr. Giglio's appeal in this Circuit would most assuredly be affirmed as the mere fact that Mr. Taliento was promised some type of consideration by the United States Attorney in exchange for his testimony against Mr. Giglio does not create a reasonable doubt as to Giglio's guilt. This conclusion would be followed by the customary citation to Agurs, supra.

In short, such things as prior perjury convictions, felony convictions, pending investigations and indictments as well as grants of immunity, promises of immunity, pleas to lesser counts, recommendations for favorable treatment--none of those items must be disclosed by the Government regarding its own witnesses as no quantum of "credibility evidence" will ever, in itself, create a reasonable doubt of a defendant's guilt.

This basic distinction between the non-disclosure of general discovery material versus nondisclosure of evidence affecting the "credibility" or "veracity" of a Government informer has led to a division among the Circuits. The question which has divided the Circuits is the same question which exists in Petitioner's case. Is the third test of United States v. Agurs, 427 U.S. 97 (1976), requiring that the undisclosed evidence create a reasonable doubt as to the defendant's guilt, ever an appropriate standard in situations where the undisclosed evidence affects the credibility of a key Government witness?

Two Circuits have refused to apply the third test of Agurs to situations involving undisclosed evidence affecting a key Government witness' credibility. Fourth Circuit: United States v. Sutton, 542 F. 2d 1239 (4th Cir. 1976); Boone v. Paderick, 541 F. 2d 447 (4th Cir. 1976); Third Circuit: United States v. McCrane, 542 F. 2d 204 (3d Cir. 1976).

The distinction Petitioner is urging this Court to draw has been soundly recognized and determined in United States v. McCrane, 542 F. 2d 204 (3rd Cir. 1976). In McCrane the Third Circuit reversed a defendant's

conspiracy conviction where the Government failed to disclose the fact that letters had been written by the United States Attorney reasonably appearing to recommend that the informer not be prosecuted for his involvement in the conspiracy. Although the Court found that a specific request had been made, the Court also indicated that even absent a specific request, the Giglio standard was applicable because the suppressed evidence involved the jury's evaluation of the informer's credibility. The Court stated:

> Agurs' applicability to the case at bar is subject to some doubt since we are concerned only with impeaching evidence. As the Supreme Court noted, Agurs "involve[d] no misconduct, and ...there [was] no reason to question the veracity of any of the prosecution witnesses...." 427 U.S. at 104, 96 S.Ct. at 2397. It may be questioned, therefore, whether there has been any change in the Giglio standard when only impeaching evidence is under scrutiny. (United States v. McCrane, 547 F. 2d, at 205-206).

Agreeing with the distinction drawn in McCrane, supra, is United States v. Sutton, 542 F. 2d 1239 (4th Cir. 1976). In Sutton, the Fourth Circuit reversed the convictions of three defendants where the government failed to disclose that the testimony of

its key witness was induced by the threats of an F.B.I. agent. The Court never discussed whether a specific or general request for discovery was made because the information affected the credibility of a key prosecution witness and the Giglio standard applied regardless of the type of request made by defense counsel. The Court held:

> United States v. Agurs, ___U.S.___, 96 S.Ct. 2392, 49 L.Ed.2d 342 (U.S. June 24, 1976), requires, we think, that we distinguish between what may be termed "veracity" (or perjury) cases and cases involving "discovery" of evidence known to the prosecution but not involving prosecutorial misconduct or corruption of the truth-finding process. Giglio v. United States, 405 U.S. 150, 92 S.Ct.763, 31 L.Ed.2d 104 (1975), was a veracity case. There the government failed to disclose a promise of leniency made to a key government witness who had testified no promise had been made to him. In an opinion by the Chief Justice, it was held that when the reliability of a witness may be determinative of guilt or innocence, nondisclosure of evidence that affects credibility is a denial of fundamental fairness required by the Due Process Clause of the Fifth Amendment. 405 U.S. at 154, 92 S.Ct. 763. We perceive no difference between concealment of a threat to prosecute. In Giglio, the standard for awarding a new trial

> was said to be whether there is any reasonable likelihood that disclosure would have affected the judgment of the jury. 405 U.S. at 154, 92 S.Ct. 763. (542 F.2d at 1241-1242)

In direct contrast with the foregoing cases are cases in four different Circuits which have applied the third test of Agurs to situations involving undisclosed evidence affecting a key Government witness' credibility if there has been no specific request for discovery made prior to trial.

Representative cases from this second group of circuits are the following. In Skinner v. Cardwell, 564 F. 2d 1381 (9th Cir. 1977) the Government only disclosed part of the plea bargain it made with the informer. The defendant was told that the Government agreed to reduce certain felony charges against the informer to misdemeanors. The Government did not disclose that it would recommend the sentence be time served. The Ninth Circuit affirmed the denial of a writ of habeas corpus by applying the third test of the Agurs case. The Court stated: "The nondisclosure of one detail of the plea agreement which would have proved only that Sorrell might be sentenced to time served

does not by itself or added to other matters in the record create a reasonable doubt as to Skinner's guilt." (564 F. 2d at 1386) The Court noted that no specific request for the details of the agreement was made.

In United States v. Brown, 562 F. 2d 1144 (9th Cir. 1977) the Ninth Circuit applied the third test of Agurs in affirming a conviction where the Government failed to disclose the first 21 pages of a 65 page statement of an informer. Those pages contained untrue statements that may have affected the informer's credibility. However, since defense counsel only made a general request for "Brady material," the Court applied the third test of Agurs.

By applying the third test of Agurs to a situation where the undisclosed evidence affected the credibility of the key prosecution witness, four Circuits of the Court of Appeals have misconstrued Agurs. The recent case of United States v. Agurs, 427 U.S. 97 (1976) must be read in light of Giglio v. United States, 405 U.S. 150 (1972). The third test of the Agurs case is applicable only to nondisclosure of "general discovery material," like investigation reports. Where the nondisclosed material involves the "credibility"

or "veracity" of a key Government witness, the Giglio standard applies and the conviction must be reversed "if there is any reasonable likelihood that the suppressed evidence could have affected the judgment of the jury" or "might have affected the outcome of the trial." (Agurs, test I and II). See, United States v. Sutton, 542 F. 2d 1139, 1141-1142 (4th Cir. 1976). Indeed, the Giglio standard was always applied to cases involving nondisclosure of evidence affecting the credibility of a key Government witness, in the Ninth Circuit, prior to this Court's decision in United States v. Agurs, supra. See, United States v. Gerard, 491 F. 2d 1300 (9th Cir. 1974); United States v. Pope, 529 F. 2d 112 (9th Cir. 1976). See also, United States v. Butler, No. 76-3275 (January 17, 1978, 9th Cir.). Petitioner submits that this writ of certiorari should be granted to resolve the conflict in the Circuits and to determine whether this Court's opinion in Agurs has been properly interpreted in subsequent decisions by the Courts of Appeals.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

JOSEPH SHEMARIA

Joseph F. Walsh

JOSEPH F. WALSH

APPENDIX A

APPENDIX A.

MEMORANDUM OPINION OF THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In the United States Court of Appeals for the Ninth Circuit.

United States of America, Plaintiff-Appellee, vs. Aaron Lax, M.D., Defendant-Appellant. No. 77-1758.

Filed February 15, 1978.

Before: Chambers and Goodwin, Circuit Judges, and SOLOMON*, District Judge.

Lax, a medical doctor, appeals from a conviction of four violations of 21 U.S.C. §841(a)(1). Two involved possession of cocaine with intent to distribute; the remaining two violations involved the actual distribution of cocaine. He contends that the government knowingly permitted their primary witness to perjure himself about the government's plea bargain with him. He also argues that the government violated

*The Honorable Gus J. Solomon, United States District Judge for the District of Oregon, sitting by designation.

Brady v. Maryland, 373 U.S. 83 (1963) by failing to disclose the entire agreement between the government and their witness. We affirm the conviction but remand the case for modification of sentence.

The primary government witness against Lax was Leonard Grossman, one of Lax's patients. Grossman had been arrested after he was observed delivering cocaine to an individual who resold it to a DEA agent. Sometime after his arrest, Grossman effectively alerted DEA agents to investigate Lax by telling his attorney that Lax had asked him what he paid for cocaine. Cooperating in the investigation, Grossman made several visits to Lax that were recorded. These tapes and other testimony established that Lax sold two 25 gram packages of cocaine to Grossman. For his illegal involvement with cocaine, Lax was placed on probation for 5 years and fined $100,000. In addition, he was ordered to pay $3,730 in investigation costs to the state of California.

To obtain Grossman's cooperation and testimony against Lax, the government entered into a plea agreement with him. Grossman pleaded guilty in in camera proceedings to conspiracy to possess and distribute cocaine. The government agreed to recommend probation

at his sentencing and to dismiss the remaining counts against him. During cross-examination at Lax's trial, Grossman was asked if the government had agreed not to oppose a withdrawal of his guilty plea if he was sentenced to prison. His answer was no. Lax contends that the transcript of the hearing where Grossman pleaded guilty to conspiracy establishes that the government had agreed not to oppose a withdrawal of Grossman's plea if he were sentenced to prison. Therefore, according to Lax, the prosecutor knowingly permitted Grossman to commit perjury without explaining to the court and jury the actual agreement between the government and Grossman. "[A] conviction obtained by the knowing use of perjured testimony...must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed. 2d 342, 349-50 (1976); see, United States v. Brown, 562 F. 2d 1144, 1150 (9th Cir. 1977); United States v. Pope, 529 F. 2d 112, 113-14 (9th Cir. 1976). However, the district court, denying Lax's motion for judgment of acquittal or in the alternative for a new trial, found that Grossman's testimony was not untruthful

in light of the equivocal nature of the questions asked and the affidavits of counsel for Grossman and the government stating that there was no specific plea bargain that Grossman could withdraw his plea of guilty if he were sentenced to prison although all parties believed that Rule 11, Fed.R.Crim.P. mandated that result. Our review of the record and the transcripts has uncovered no error in the district court's finding.

Lax also argues that the true nature of the plea agreement was not disclosed to him in violation of Brady, supra. Like the district court, we are not convinced that there was any nondisclosure. And even assuming that the complete plea bargain was not disclosed, the standard of review is whether the undisclosed evidence creates a reasonable doubt about Lax's guilt that did not otherwise exist since Lax made only a general request for exculpatory material. See United States v. Agurs, supra; United States v. Brown, supra; Skinner v. Cardwell, __F.2d__ (9th Cir. 1977)(slip opinion Nov. 29, 1977, p.2964, 2967-68). Grossman was impeached by his plea agreement, the reason for the continuing of his sentencing hearing, his past criminal activities, his personal habits and his motives for testifying. In

addition, defense counsel told the jury in closing argument that Grossman would not have to spend any time in prison because of his testimony against Lax. In light of this record, even if we were to conclude that the government had agreed not to oppose a change in plea by Grossman should he be sentenced to prison, this undisclosed portion of the plea bargain would have created no reasonable doubt that did not already exist.

Lax also challenges certain instructions given by the district court and the rejection of certain instructions requested by him. We find these challenges to be without merit.

We held in United States v. Oropeza, 564 F. 2d 316, 323-24 (9th Cir. 1977) that when the sole evidence of possession is the evidence of distribution, the offenses merge and defendant may be punished only once. The charges against Lax arose from two distribution transactions. As to the sale on March 29, the record reveals that Lax placed two 25 gram packages of cocaine on his desk and asked Grossman to select the one he wanted. This is sufficient independent evidence of possession with intent to distribute apart from the actual distribution to support punishment on each offense. However, as to the April 7 transaction,

the government concedes that there is no evidence of possession of 25 grams of cocaine independent of the evidence of distribution on that date. Therefore sentencing for possession with intent to distribute arising from the latter transaction was improper.

Both sides concede that the additional "fine" of $3,730 to the State of California exceeds statutory authority. See United States v. Taxe, 540 F. 2d 961, 970 (9th Cir. 1976) cert denied, 429 U.S. 1040 (1977).

The judgment of conviction is affirmed.[1/] The case is remanded for vacation of the sentence imposed on count five and elimination of the obligation to the State of California consistent with this opinion.

1/ While this case was under submission, Lax sought to raise a new argument based on the district court's denial of his motion to compel Grossman to name the source of his cocaine for the sale resulting in Grossman's arrest. Rule 28(a)(2), F.R.App.P., and responsible judicial administration requires appellant to assert in his opening brief all

Footnote 1 [continued]

errors relied upon on appeal. See, e.g., Lenske v. Steinberg, 415 F.2d 711, 712 (9th Cir. 1969), cert. denied, 397 U.S. 1075 (1970); Gilbert v. U.S., 359 F. 2d 285, 288 (9th Cir. 1966); Frederick v. U.S., 163 F. 2d 536, 549 (9th Cir.), cert.denied, 332 U.S. 775 (1947); U.S. v. Haldeman, 559 F.2d 31, 78 n.113 (D.C. Cir. 1976); U.S. v. White, 454 F.2d 435, 439 (7th Cir. 1971); cert. denied, 406 U.S. 962 (1972); Mississippi River Corp v. FTC, 454 F. 2d 1083, 1093 (8th Cir. 1972). Exceptions to the general rule do exist where its application would be "unduly harsh," e.g., Gebhard v. S.S. Hawaiian Legislator, 425 F.2d 1303, 1306 n.1 (9th Cir. 1970), or where substantial public interests or funds are involved, e.g., Consumers Union v. FPC, 510 F.2d 656, 662 (D.C. Cir. 1974). Neither of these exceptions is applicable to the case before us. We view the alleged error as waived.

In addition, under the facts of this case the district court's order was at most harmless error.

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